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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 303

C. H. SELLERS AND CLARA H. SELLERS, GRACE L. PERRY, WILLIAM L. FLEMING AND LAURA A. FLEMING; CLARENCE R. BOLING; VERA C. BONDURANT; BERT A. PURCELL; RALPH HOUGH; MAE BALCOM; EUNICE M. McCOY; MARVIN DICK VOTH; W. A. HENSLEY; STOCKYARDS BANK; STELLA I. McCOY; E. M. GOODSON; D. W. JENKINS; HAROLD F. WESTCOTT; SIGNAL ROYALTIES COMPANY, A CORPORATION; AND TOM W. GARRETT,

Petitioners.

vs.

STANOLIND OIL AND GAS COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Petitioners,

vs.

STANOLIND OIL AND GAS COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners C. H. Sellers and Clara H. Sellers hereby apply for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USCA Sec. 1254(1). The decision below was rendered May 16, 1949 (R. 483), a timely Petition for Rehearing being denied July 22, 1949 (R. 503).

Opinions Below

The opinion below is unreported but will be found at (R. 483). The District Court's opinion will be found at (R. 175). Findings of Fact and entire Conclusions of Law at (R. 162).

Questions Presented

1. Rule 52 (a) of the Rules of Civil Procedure provides that in a jury-waived case "findings of fact shall not be set aside unless clearly erroneous." The Court below, under the guise of examining the record to ascertain if there was substantial evidence to sustain Petitioners' judgment, reversed by the device of overturning a long series of Findings of Fact based upon conflicting expert testimony. The question presented is whether this does not amount to paying mere "lip-service" to Rule 52(a), a practice condemned by this Court, under similar circumstances, in *Federal Trade Commission* v. *Algoma Lumber Co.* 291 U. S. 67, 73.

2. Whether, under Rule 52(a) an appellate court can overturn findings of fact based on conflicting testimony of oil experts by preferring the testimony of Respondent's four experts over Petitioners' one expert, because Respondent's experts had personal knowledge of the field and Petitioners' expert, it erroneously held, had derived his facts in part from outside sources, such as logs of wells, geological data, etc.

3. The Court below, having set aside the Findings of Fact, reversed *in toto*, with directions to enter judgment for Respondent. A reading of the opinion shows the reversal

was based (a) on what the Court calls "physical facts" (R. 487) and (b) by excluding the testimony of Petitioners' expert witness, which the Court held in most part incompetent. Under these circumstances, the case being at law, the Court below had power only to remand for a new trial.

4. It belatedly appears the case was removed from the State Court on the ground of a separable controversy. Was it truly separable when co-defendants other than Respondent, who possessed overriding royalty interests in the oil base, were at the time of remand indispensable parties to cancellation of the lease held by Respondent?

Statement

Respondent, Stanolind, on January 18, 1945, purchased oil and gas lease rights on Petitioners' 160 acres of land, engaging to pay Petitioners, conventional royalty owners, 1/8th royalty on any oil and gas produced, and to pay overriding royalty owners[1] 1/16 of 7/8ths on any oil and gas produced (R. 17, 19).

At the time respondent acquired Petitioners' lease, drilling development in the area had reached a frantic state of rapidity. On October 19, 1945 commercial production was encountered directly offsetting Petitioners' lands, thus entitling Petitioner to an immediate protection well. It was not until after a second offset commercial well to Petitioners' land was completed, that Respondent began drilling and brought in on April 22, 1946, a commercial well on on Petitioners' land. The two wells immediately offsetting the Petitioners' land to the west (produced 121,589 barrels to October 1, 1947) had an effective Hunton-Lime

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[1] "In addition to the regular royalties provided in the commercial lease, there is what is known as an 'overriding royalty' which is an additional royalty carved out of or reserved in the gross production by the lessee on his assignment of an interest in the lease."

Oil and Gas Leases, Second Edition, Glassmire, Page 237, § 64.

structure of 151 feet to 148 feet (R. 105, Units 303 and 320), which are exceeded by only six other wells of the entire 740 wells in the Field. These six wells are located within a mile or two miles of Petitioners' tract (Exhibit "L," R. 93 to 121).

Only 170 wells of the 741 wells in the Field had a pay formation exceeding the thickness of Petitioners' No. 1 Well; the only well drilled on Petitioners' tract.

The Trial Court found the Petitioners' well produced 27,000 barrels up to October 1, 1947, and $71,947.32 worth of oil up to May 1, 1948; approximately one month before the trial.

The present suit grew out of the fact that offset wells on land to the West (Fleming Lease) of Petitioners' land was draining off Petitioners' oil, but respondent refused and neglected to drill production wells (other than the one well) on Petitioners' land during the flush production and high-price period, when there existed the greatest demand for drilling such acreage.

Drainage continued to occur until the West Edmond Hunton-Lime Unit was unitized by the Corporation Commission on October 1, 1947, and is still occurring through production and operation of the unit which surrounds Petitioners' 120 acres of land in all directions except East and in which unit Respondent owns 10½%.

The map (Exhibit "I", R. 59), shows these wells, Petitioners' tract being identified as "Sellers" in the right center of said map.

The trial court rendered judgment against Respondent for the total amount, for all plaintiffs, of $220,101.52 (R. 175-176) which the Court below reversed *in toto* ordering judgment entered for Respondent.

Petitioners, citizens and residents of Oklahoma, filed suit in the Oklahoma State Court (R. 3) against Stanolind, a Delaware corporation, and overriding royalty holders, Sig-

nal Royalties Co., Westcott & Jenkins, all citizens and residents of Oklahoma (R. 25). Respondent, on January 15, 1947 (R. 27), removed the suit to the United States District Court on the ground of a separable controversy, treating the other Oklahoma defendants as unnecessary parties (R. 24-27).

Petitioners asserted three causes of action, all based on Stanolind's neglect and refusal to drill protective wells on Petitioners' property. The first set forth the drilling of off-set wells on adjoining leases, shown by the map above referred to and prayed cancellation of the lease (R. 7). The Court held this cause of action abandoned (R. 168) by reason of Respondent's release of the lease of record January 17, 1947, after suit was filed and after removal (R. 27) but prior to trial.

The second cause of action claimed damages on account of the drainage of oil and gas from the lease between October 19, 1945 (the date the first offsetting well was completed) and January 17, 1947 (the date the lease was released) (R. 8-12). On this the Trial Court gave judgment in the amount of $16,022.13 (R. 175).

The third cause of action alleged damages on account of Respondent's deliberate and wrongful conduct in not drilling protection wells or surrendering the lease timely after October 19, 1945 (R. 12-13) thereby making it impossible for Petitioners to procure development of the land by others, the damage to be measured by the drainage to occur from January 17, 1947, until the exhaustion of the field in 1960. On this the Trial Court gave judgment in the amount of $204,079.39 (R. 176).

Respondent's defense amounted to a general denial and the claim that the off-set wells on adjoining property were not commercially profitable and hence any protective wells drilled on the remaining locations on Sellers' land would not be profitable and there was no obligation to drill them.

This latter led to the expert testimony as to which there was a marked division of opinion between the trial court and the Court of Appeals. The trial court believed the testimony of Wheeler, Petitioners' expert, while the appellate court preferred that of four experts for Respondent, all captive engineers and geologists of big companies.[2]

The trial court, applying the "prudent operator" test (*Gerson* v. *Anderson-Prichard Co.* 149 F. (2) 444) made Findings of Fact that when Stanolind on April 22, 1946 completed Sellers No. 1 as a commercial producer and made no further development, although repeatedly demanded, it permitted drainage of oil and gas from the remaining 120 acres on Sellers' tract for which it must be held responsible. (R. 165) It held a prudent operator would have drilled additional wells thereon at any time prior to August or September 1946 and that such wells would have been profitable at then prices and would have prevented drainage. (R. 165-166) It held Stanolind knew of the imminence of unitization of the field under an Oklahoma law which Stanolind backed. Unitization made the field in effect one well (R. 166) and as Stanolind owned over 10 per cent of the field it stood to gain $137,334.55 with no investment and expense. (R. 168)

Hence, it was to Stanolind's interest to let Petitioners' oil be drained away and for this the Trial Court held Stanolind responsible. (R. 160-170)

The Court below overturned the Trial Court's Findings *seriatim*, finding geological reasons for believing new drillings would be unprofitable and excusing failure to drill new Sellers locations on the ground Stanolind had the opportunity to observe performance of Sellers No. 1 well for a number of months. (R. 483) It did so from April 22,

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[2] The big companies took great fright at this first effort to bring them to book. Their friends filed a brief below as *amicus curiae*.

1946, the day it came in, until October 3, 1946, the day it assigned to Jenkins, an overriding royalty holder. The Court below ignored testimony that it was local practice in the field to drill protective wells immediately and apparently overlooked Dr. Wheeler's testimony on rebuttal. The record (R. 384) discloses that Dr. Wheeler testified that he was present throughout the trial, heard all of the testimony of the expert witnesses produced by Stanolind and their opinions based upon factual data available to all, and again expressed his conviction that a prudent operator would have drilled.

The rest of the opinion below whittles down Petitioners' expert's qualifications, competency and testimony, arriving by these means at the conclusion that there was no substantial testimony in the record to sustain the Court's Findings of Fact. Significantly the Court ignored impending unitization as the obvious explanation for Stanolind's inaction.

Reasons for the Allowance of the Writ

1. It is evident that the court below, under the guise of ascertaining whether there is substantial evidence to sustain the judgment, has given Respondent a trial *de novo* in a jury-waived lawsuit. Indeed, in its opinion it refers to itself as "we the trier of the facts." The opinion itself shows a complete retrial, in violation of Rule 52(a) of the Rules of Civil Procedure, in the course of which the court weighs evidence, evaluates the competency of expert witnesses, estimates the force of what it calls "physical facts," and finally, reverses for insufficiency of evidence. All this it does in the absence of a motion for judgment under Rule 41(b) either made at the close of plaintiffs' case or renewed at the close of defendant's, so that the question of the sufficiency of the evidence was never brought specifically

to the attention of the Trial Court.[3] Had a jury been present, such failure would have been fatal to appellate review.[4]

It may be questioned whether in the present case it should not likewise be deemed fatal both on the theory that appellant below asked review on a point not specifically drawn to the attention of the Trial Court[5] and also because an appeal in law cases is simply the old writ of error which reviews only errors of law.[6]

Most lawyers feel that it is the policy of the Rules of Civil Procedure to discourage jury trials. But with knowledge of the decision below, no lawyer with any sense will from now on waive a jury trial in the Tenth Circuit. Had

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[3] *First National Bank* v. *Litteer* 10 F. (2) 447, 448; *Century Furniture Co.* v. *Bernhardts, Inc.* 82 F. (2) 706, 707; *Hoblik* v. *U. S.* 151 F. (2) 971, 972; *Jackson County, Mo.* v. *Alton R. Co.* 105 F. (2) 633, 638; *Mutual Assn.* v. *Bowman* 99 F. (2) 856, 857. Cases such as *Bingham Pump Co.* v. *Edwards* 118 F. (2) 338, 339-340, *U. S.* v. *Boston & Maine R. Co.* 117 F. (2) 42, 427; see also *Becker* v. *Evens Pipe Co.* 70 F. (2) 596, confuse the lack of necessity of excepting to Findings under Rule 52(a) with the need for the Motion for Judgment to present a question of law in a non-jury case. See the query in *Hill* v. *Ohio Casualty Co.* 104 F. (2) 695, 696 as to whether Rule 52(a) dispenses with such a Motion. In *Mutual Benefit Assn.* v. *Bowman* 99 F. (2) 856, 857 the Court held that in a jury-waived case there was a Constitutional bar to considering the sufficiency of the evidence on appeal, absent the Motion below.

[4] See cases collected in 4 Fed. Dig. Appeal & Error, Sec. 237(5).

[5] See *Hoblik* v. *U. S.* 151 F. (2) 971, 972; *First National Bank* v. *Litteer* 10 F. (2) 447.

[6] The Act of April 26, 1928, 45 Stat. 466, Chap. 440, which clarified the Act of January 31, 1928, 48 Stat. 54 abolishing the writ of error restricts the relief obtainable on appeal, in law cases, to that formerly obtainable on writ of error. The Clarifying Act, which became 28 U.S.C.A. Sec. 861(b) was not repealed by the Act of June 25, 1948, C. 646, Sec. 23, 62 Stat. 990 establishing the new Code, now 28 U.S.C.A. Judiciary and Judicial Procedure. In the latter, at page 2041 there is a specific statement that the Clarifying Act, 28 U.S.C.A. Sec. 861(b) was omitted from the new Code but not repealed. See also its absence from Schedule of Laws repealed at p. 1663. On writ of error there can be no review of the weight of the evidence which involves an error of fact. (See *Federal Intermediate Bank* v. *L'Herisson* 33 F. (2d) 841, 843 and cases here collected; *White* v. *U. S.* 48 F. (2) 178, 180. The review is the same as in a jury case. (*Mercantile Ins. Co.* v. *Folsom* 85 U. S. 237.)

the present case been tried by a jury no reversal could possibly have occurred both because there was substantial evidence upon which to submit the case to the jury and because there was no motion assailing the sufficiency of the evidence and hence no question of law reviewable on appeal.[7]

So the case shows one result with a jury and another result without a jury—an anomalous situation which merits this Court's review.

2. The decision of the court below is in conflict with this Court's decision in *Federal Trade Commission* v. *Algoma Lumber Co.* 291 U.S. 67, 73, wherein this Court held the Court of Appeals had merely paid "lip-service" to the rule now enunciated in Rule 52(a) that findings of fact should not be set aside unless clearly erroneous.[8] Here as there, the Court was guilty of "picking and choosing for itself among conflicting inferences." The decision below is likewise in conflict with this Court's decision in *Walling* v. *General Industries Co.* 330 U.S. 545, 550 and authorities there cited, wherein this Court held that a Circuit Court of Appeals rejection of findings of fact could not rest upon conflicting testimony and that the District Court having heard the witnesses was the proper judge of their credibility.

This Court has frequently stated that "it is not for us to retry the facts." (*Esenwein* v. *Penn.* 325 U. S. 279, 281, *Rice* v. *Rice* 93 L. Ed. 770, 771) and Mr. Justice Frankfurter has several times commented upon the impossible task forced on this Court if it were to try to do so. (See *U. S.* v. *Knight* 93 L. Ed. 665, 668; *Nye and Nissen* v. *U. S.* 93 L. Ed. 752, 758.) We suggest that the way to avoid such applica-

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[7] See cases cited *supra* above notes.

[8] The decision below is also in clear conflict with *U. S.* v. *Aluminum Company of America* 148 F. (2) 416 and other cases in the Second Circuit, holding that findings of fact are virtually unassailable where the Trial Court had the opportunity of seeing the witnesses.

tions is to compel the Courts of Appeal to obey the rules and themselves abstain from re-trying the facts. In the present case we think the court below has flagrantly violated Rule 52(a) and we draw the attention of this Court to the statement of Chief Justice Taft in *Los Angeles Brush Co.* v. *James* 272 U. S. 701, 708, wherein, faced with a similar violation of the Equity rules, he said that "we intend so far as lies in our power, to make them reasonably effective for the purpose had in view in their adoption."

3. The Court below concluded its opinion as follows:
   The judgment is Reversed in toto and the cause is Remanded with directions to enter judgment for appellant.

While 28 U.S.C.A. Sec. 2106 allows an appellate court power on reversing to "direct the entry of such appropriate judgment as may be just under the circumstances" it must be remembered the present appeal is in a case at law. Under the predecessor statute, 28 U.S.C.A. Sec. 877 it has been consistently held that on reversal for insufficiency of the evidence the case must be sent back for a new trial. (*Indemnity Co.* v. *Levering* 59 F. (2) 719, 720; *Millers Fire Ins. Co.* v. *Bell* 99 F. (2) 289, 291; *Northern Pacific R. Co.* v. *Van Dusen Co.* 34 F. (2) 786.) The decision below is in conflict with these cases, and with hornbook law on the nature of review on writ of error. The present case does not come within exceptions noted in *Thornton* v. *Carter* 109 F. (2) 316, 319, where in a jury-waived case the case is submitted on an agreed statement; or where, as in *Fort Scott* v. *Hickman* 112 U. S. 150 the Trial Court's Findings of Fact are sustained by the evidence and complete but its conclusions of law erroneous. The absence of a motion for judgment also renders inapplicable cases such as *Slocum* v. *N. Y. Life Ins. Co.* 228 U. S. 364, and its derivatives.

As the Court below arrived in part at its conclusion as to the insufficiency of Petitioners' evidence by favoring defendant's four experts over plaintiffs' one expert, counting heads as it were, it is obvious plaintiffs can even things up by getting a few additional expert witnesses on the fact questions involved and thus re-try the case to meet the demands to the Court below.

4. It is a close question whether the Trial Court had jurisdiction as a Federal Court. The petition for removal from the State Court was filed January 15, 1947. The right of removal depends upon the case disclosed by the pleadings as they stand when the petition for removal was filed.[9] On that date the first cause of action prayed a cancellation of the lease naming as co-defendants with Stanolind, Westcott and Jenkins, overriding royalty owners who were of the same citizenship (Oklahoma) as plaintiffs. It is obvious that they were indispensable parties to the cancellation of the lease, as its cancellation would deprive them of their royalty rights thereunder.[10] Hence, as of the date of suit there was no separable controversy, wholly between citizens of different states. It was not until later during the trial of the case that defendants, Westcott and Jenkins, became intervenors. (R. 31)

It is noticeable that the District Court, in its Findings of Fact (R. 163) treated the removal as being based on diversity of citizenship. But this gives less ground for re-

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[9] *Barney* v. *Latham* 103 U. S. 205.

[10] Okla. Stat. Annotated, Title 12, Sec. 232, 236; *Bell Telephone Co.* v. *State* 75 Okla. 42, 181 Pac. 487; Merrill Second Edition, Covenants Implied in Oil and Gas Leases, Chapter 11, Sec. 203, page 438; *Schubert* v. *Miller*, 119 Southwestern (2nd) 139, (Tex. Civ. A. 1938); *Sharp* v. *Landowners Oil Ass'n* 127 Tex. 147, 92 Southwestern (2nd) 435; *Hartman Ranch Co.* v. *Assoc. Oil Co.* 10 Calif. (2nd) 232, 73 Pac. (2nd) 1163; *Hudson* v. *Newell* 172 Fed. (2nd) 848; *Tamsk* v. *Continental Oil Co.* 158 Kan. 747, 150 Pac. (2nd) 326.

moval than if a separable controversy were involved, it being clear that Westcott and Jenkins were "substantial defendants"[11] at the time the removal petition was filed and did not join it.

Conclusion

It is respectfully submitted that the petition be granted and the judgment below reversed.

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[11] *Belcher* v. *Aetna Life Ins. Co.* 3 F. Supp. 809-812; *Fraser* v. *Jennison* 106 U. S. 191. The fact that the parties through inadvertence, or otherwise have failed to question the jurisdiction below does not prevent the point being raised here. See *Mansfield R. Co.* v. *Swan* 111 U. S. 379.